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FOR IMMEDIATE RELEASE

District court dismisses petition to block Board's press releases

DES MOINES, IA – A Polk County District Court has dismissed a petition seeking to enjoin the Iowa Board of Medicine from publication of summaries of charges against an Iowa-licensed orthopedic surgeon who formerly practiced in Des Moines.

The petition was filed against the Board by Leonard D. Lomax, M.D., who said the Board's press summaries, website postings and mandatory reports to national data banks on physician discipline were inaccurate and that these inaccuracies caused him to be unemployable.

In 2008, the Board accused Dr. Lomax of seven counts of professional misconduct. After an administrative hearing in 2009, the Board found him guilty of fraud in procuring a license, knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of medicine, unethical or unprofessional conduct, and alcohol-related substance abuse. The Board found the other three charges against him, disruptive behavior, sexual misconduct and sexual harassment, were not supported by a preponderance of the evidence.

A hearing on the petition was held May 31 and the court's decision was filed August 22.

The court, in dismissing the petition, said the press releases and national data bank reports were accurate summaries of the allegations and the Board's decisions. Further, the court noted Dr. Lomax presented no independent evidence that the summaries and data bank reports, as compared to the facts and findings of the original unchallenged decision of the Board, affected his employment opportunities.

"Those entrusted with monitoring the conduct of professionals do so with a singular purpose: Protection of those who literally place their lives and welfare in the hands of a professional. Transparency in reviews of professional conduct brings with it community knowledge and security," the court wrote. "The disciplinary decision is a public record. Publication of the Board's decision is statutorily mandated. Its rules provide reporting of final decisions nationally."

The following is the court's decision:

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEONARD D. LOMAX, M.D.,

Petitioner,

vs.

IOWA BOARD OF MEDICINE,

Respondent.

Equity No. EQCE066809

RULING

I.

On May 31, 2011, a contested, reported hearing was held on Petitioner's request for equitable relief. The administrative record was submitted on July 19, 2011.

Petitioner was disciplined by the Iowa Board of Medicine for certain unprofessional conduct. Those findings were made following an adversarial agency proceeding. Petitioner did not seek judicial review of those conclusions nor the sanctions imposed. He complied with the remedial requirements dictated by the Board.

The conflict here relates to the Board's publication of summaries of the charges originally levied against him and the agency's final decision, which addressed not only those charges that resulted in discipline, but those which were dismissed or found to be without evidentiary support before the agency. The complete agency statement of charges and final decision were also published, but Dr. Lomax takes no issue with those.

Petitioner contends that he is now unemployable because of the Board's dissemination of the summaries of unproven professional misconduct. He asks the Court to enjoin the Board from further publication of these alleged misleading statements and to oversee the Board's further publication.

While the Board initially questions the Court's authority to address this dispute, it defends on both substantive and procedural grounds.

II.

Dr. Lomax is an orthopaedic surgeon previously licensed to practice in Iowa. He was and is subject to professional regulation by the Iowa Board of Medicine.¹ The Board consists of both physicians and lay members who are gubernatorial appointees.² The Board functions within the parameters of the Iowa Administrative Procedures Act.³

In 2008, the Board accused Dr. Lomax of seven counts of professional misconduct: 1) Fraud in procuring a license, 2) Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of medicine, 3) Unethical or unprofessional conduct, 4) Substance abuse, 5) Disruptive behavior, 6) Sexual misconduct, and 7) Sexual harassment.

Factually, the accusations rested on assertions that he had repeatedly failed to disclose criminal charges, most of which were alcohol related, on professional license applications. The balance of the claims related to improper sexual advances toward a co-worker and patient and general incompetent professional behavior. Conviction of a crime in and of itself was not a specific count; the failure to adequately disclose it was.

The Board issued a press release after the charges were filed summarizing the more detailed and lengthy charging document. Both the formal statement of charges and press release are available to the general public on the Board's website.

Following an adversarial hearing in the fall of 2009, the Board concluded that Counts 1, 2, 3, and 4 were supported by a preponderance of the evidence, and Counts

¹ Iowa Code Chapters 147, 148 and 272C (2011).

² Iowa Code 147.14(2).

³ Iowa Code Chapter 17A.

5, 6, and 7 were not. In the opinion of the Board, the claims relating to dishonesty and substance abuse were proven but the claims of sexual harassment were not. Discipline was imposed.⁴ Dr. Lomax accepted these findings and did not seek judicial review.

Two weeks after the Board handed down its decision it issued a press release that summarized its conclusions. The press release and the actual final decision itself are available to the general public on the Board's website.

In addition, the Board submitted its final decision to the National Practitioner Data Bank and the Healthcare Integrity Protection Bank as required by Federal law. Dr. Lomax took umbrage with the second press release and data bank reports. He suggested revisions. Suggested revisions drafted by the Board were presented to but rejected by Dr. Lomax. A challenged review of the data bank reports is presently pending before the United States Department of Health and Human Services.

When the parties reached an impasse regarding the language of the press release and data bank submissions, Dr. Lomax sought equitable relief from the Courts.

⁴ The record before the Board verified four arrests and one additional encounter with law enforcement between October of 2002 and September of 2004. All were alcohol related and one resulted in a conviction. Several of the incidents arose from domestic situations.

Dr. Lomax made applications for an Iowa medical license in 2002, 2003, 2005, and 2007. He was required to disclose criminal charges and to update his disclosure. He blatantly failed to disclose his criminal charges in three instances and provided a half truth in the fourth.

He also failed to appropriately disclose a probationary status during an internship, residency, or fellowship.

The record clearly demonstrates his dishonesty in the application process and alcohol and anger management issues. Mental health evaluations conducted at the behest of the Board and privately done upon Dr. Lomax' request evidence mental health issues involving acceptance of responsibility for his own conduct, abuse of substances, and an inability to properly address the stress of commencing a medical practice and domestic issues. The Board specifically found that Dr. Lomax had not treated patients while under the influence of alcohol.

Dr. Lomax was given an opportunity to present his position to the Board. The Board's conclusions, bases for those findings, and sanctions were fair and equitable.

Initially, Dr. Lomax named the Board's executive director as a defendant. The Court granted a dismissal of the executive director from the suit as well as claims of defamation and heard the case on judicial review of "other agency action."

III.

The Court's authority here is to correct legal errors of the agency.⁵ Any order adverse to the agency must be based on a record that shows the doctor's substantial rights have been prejudiced under Chapter 17A.19(10)(a)-(n). The physician has the burden of proof.⁶

In examining the agency's action, the Court determines if it was unreasonable, arbitrary or capricious.⁷ Evidentiary supplementation of the record is permitted only to help the Court make that determination.⁸ The Court permitted testimony from the Board's executive director, the Board's chairman, a non-practicing medically trained Board member, and a legally trained Board member. The Court also took testimony from the Board's director of legal affairs and Dr. Lomax.

IV.

The heart of this matter is Dr. Lomax' claims that the press releases and the database reports are inaccurate and that these inaccuracies have caused Dr. Lomax to be unemployable. He testified that he has been unable to find work as an orthopaedic surgeon since the initial press release following the filing of charges by the Board.

In response to Dr. Lomax' request to have the Board amend the data bank information, the Board's legal director said he would "do what he could so the doctor

⁵ *Doe v. Board of Medical Examiners*, 733 N.W.2d 705 (Iowa 2007).

⁶ Chapter 17A.19(8)(a).

⁷ *Sheet Metal Contractors of Iowa v. Iowa Commission of Ins.*, 427 N.W.2d 859 (Iowa 1988).

⁸ *Sindlinger v. Iowa State Board of Regents*, 503 N.W.2d 387 (Iowa 1993).

could work.” Efforts were made by the Board to accommodate the doctor’s concerns but common ground could not be reached. The record also reflects that there were limitations on the federal reporting forms beyond the control of the Board that may have worked to Dr. Lomax’ disadvantage.

Dr. Lomax conceded under oath that the press releases of the Board were “consistent” with the charges levied and the Board’s decision. He also conceded that dishonesty and substance abuse by a physician (findings regarding his conduct which are undisputed) could affect patient care. These are significant concessions, as they mitigate against the assertion that the press releases were inaccurate, and the data bank report referring to his inability to practice safely because of alcohol or substance abuse.⁹

Dr. Lomax’ primary complaint concerns the federal data bank entry describing him as “unable to practice safely by reason of alcohol or other substances.” It is his view that this national database reporting form should have contained a detailed explanation that his substance abuse problems were not a “current” issue. He notes that had the Board considered substance abuse to have been a current problem, he would have been suspended from the practice rather than the more lenient sanctions imposed. Thus, he finds an incongruity between “what was said” in the report and “what was done” by way of sanction.

⁹ This language in the data bank report was not that of the Board’s. It is one of several options in a checklist configured by the agency to whom the Board makes the report. There is only one option relating to substance abuse by physicians in the reporting form, and the Board understandably selected it. The balance of the information provided in the report accurately addresses the time frame within which Dr. Lomax was most challenged by substance abuse. It fairly points out that he has not treated patients while under the influence. Thus, the Board selected the reporting option from those delineated by the form provided and, in narrative form, put that selection in context.

It is important to remember that a prospective employer has the full Board decision available for its review and that persons with significant alcohol issues must deal with them throughout their life.

V.

The Board has three lines of defense: 1) Dr. Lomax' complaints are untimely, 2) the press releases and data bank reports were accurate, and 3) if the doctor is entitled to relief, the proper forum is the agency, not the courts.

A.

Generally, arguments not preserved should not be entertained on judicial review.¹⁰ The assertions made here concerning dissemination of summary press releases and federal reports are well beyond the time frame allowed for seeking judicial review of the Board's decision regarding professional misconduct.

The Board's final decision was entered on December 3, 2009. The attendant press release was issued December 16, 2009. No judicial review was taken. The present action was commenced on October 26, 2010.

In his briefing, Dr. Lomax provides no argument relating to time constraints for a court's review of agency action. Suffice to say, the prosecution of this case is unlike any other seen by this Court involving alleged adverse consequences of agency action. And, while dispensing with the matter on timeliness grounds might seem expedient, addressing the merits more fairly addresses the needs of the parties.

B.

The Court agrees with the Board that the press releases and database reports are accurate summaries of the allegations and the Board's decision. Dr. Lomax conceded the accuracy of the press releases from the witness stand. The specific charges, findings and detailed decision (never disputed by judicial review) are public record, available to the world via the Internet. A comparison of the database summaries

¹⁰ *KFC Corp. v. Iowa Dept. of Revenue*, 792 N.W.2d 308 (Iowa 2010).

with this decision lead the Court to conclude that the report, too, accurately summarizes the charges, the misconduct, and the agency findings. Public availability of the actual charging document and final decision begs the question of causation. What proof is there in this record that Dr. Lomax' failure to gain employment was due to the press release and database summaries as compared to the actual facts and findings of the original unchallenged Board decision itself?

Dr. Lomax presented no independent evidence of prospective employers to inform the Court that the summaries or database report, as compared to the decision of the Board, persuaded them not to offer him employment. Nor can he show that his history of medical negligence claims did not affect his employment opportunities. Nor did he show that potential employers were not dissuaded as the result of contacting prior employers as compared to reading only the summaries or database reports.

This lack of evidence on the question of causation, the disputed accuracy of the summaries notwithstanding, prevents the Court from finding that the doctor's substantial rights were prejudiced by the Board's action.

Those entrusted with monitoring the conduct of professionals do so with a singular purpose: Protection of those who literally place their lives and welfare in the hands of a professional. Transparency in reviews of professional conduct brings with it community knowledge and security.

Here we deal not with rumor or innuendo, but clear factual conclusions forged in the crucible of the adversarial process, albeit administratively. The charges are public record.¹¹ The disciplinary decision is public record.¹² Publication of the Board's

¹¹ *Reveiz v. Board of Medical Examiners*, 2007 WL 1342553 (Iowa App. 2007).

decision is statutorily mandated.¹³ Its rules provide reporting of final decisions nationally, through databases such as the National Practitioner Data Bank, The Federation of State Medical Boards, and other media outlets.¹⁴

Dr. Lomax would have the Court believe that he was slandered and defamed. Such is not the case. While notice of his past misconduct has been publically disseminated and there may be repercussions, the consequences, in the Court's view, flow from what he did, not from what the Board did. He was judged by a legally constituted, informed body of fact finders. They rendered a decision adverse to him based on his behavior and published their reasoning. He never challenged their conclusion or the bases for those conclusions. Who then is truly responsible for his present difficulty gaining employment?

In short, the Court finds the press releases and database reports to be accurate synopses of the Board's charges and decision. Even if one concluded they were not, Dr. Lomax has failed in his burden of proving that the releases and reports, as compared to the actual final decision or other third-party disclosures relating to his professional conduct, have impeded his employment.

C.

Finally, the Board argues that if it has erred in the performance of its duty, this matter must be remanded to the agency for ameliorative action. As the Court has determined the record supports the propriety of the Board's action, this issue is moot.

¹² Iowa Code Section 272C.6(4)(a); 653 IAC 2.15(4); 653 IAC 25.32; see also *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005).

¹³ Iowa Code Section 272C.5(1)(d).

¹⁴ 653 IAC 25.32.

VI.

Based on the record, the Court finds that Petitioner has failed to establish his substantial rights were prejudiced by action of the Iowa Board of Medicine under Chapter 17A.19(10). The action of the Board was neither unreasonable, arbitrary or capricious. The petition is dismissed with costs assessed to Petitioner.

SO ORDERED this 19th day of August, 2011.

ROBERT J. BLINK, JUDGE
Fifth Judicial District of Iowa

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